

Florida 404 Talking Points

- Historic approval of Florida's request to administer the Clean Water Act Section 404 Program
- Announcing the decision to approve Florida's request on Thursday, December 17 at a press conference with Florida Department of Environmental Protection (DEP) Secretary Noah Valenstein, U.S. Department of the Interior Secretary David Bernhardt, White House Council on Environmental Quality Chair Mary Neumayr, U.S. Congressmen Mario Diaz-Balart (FL-25), Gus Bilirakis (FL-12), Dan Webster (FL-11), John Rutherford (FL-04), Michael Waltz (FL-06), and Greg Steube (FL-17), EPA Assistant Administrator for Water Dave Ross, Principal Deputy Assistant Secretary of the Army for Civil Works Ryan Fisher, and EPA Regional Administrator Mary Walker.
- This decision represents an intensive effort requiring coordination with four other federal agencies, three state agencies, and eight tribal governments. Under the CWA, EPA had only 120 days to act on Florida's request to assume the program. EPA worked with Florida prior to submission to help ensure that its program would comply with CWA requirements, including changes to its state-specific statutes and regulations.
- In the 43 years since the CWA was amended to provide for state or tribal assumption, only two states, prior to today's decision, have assumed administration of the CWA Section 404 program (Michigan and New Jersey).
 - Congress clearly intended that states assume the program similar to how the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) program operates, where 47 states now implement all or portions of the Section 402 program.
 - Over the years, some states have expressed interest in the Section 404 program, but questions regarding what waters they could regulate and issues related to Endangered Species Act compliance, among other reasons, were frequently cited as impediments to program assumption.
 - In 2015, EPA formed a federal advisory committee to evaluate the scope of assumable waters question. That advisory committee delivered a report to EPA in 2018 with recommendations on how to clarify what waters the states could assume, specifically targeting a long-standing Army Corps of Engineers policy position that limited the scope of waters states could assume and thereby decreasing state interest in taking on permitting responsibility (it was not worth standing up permitting programs if the Corps would retain authority over most waters).
 - In 2018, EPA worked with the Army Corps of Engineers to reverse its policy.
 - Almost immediately, multiple states began engaging with EPA regarding renewed interest in the program. EPA also initiated rulemaking looking to modernize its state assumption regulations.
 - In 2020, EPA took comment on and reversed prior agency positions related to whether and how the Endangered Species Act applies to state Section 404 permitting programs. The new agency position provided greater regulatory certainty and clearer liability protections for state-issued permits.
 - EPA believes that these regulatory policy changes will increase the likelihood that more states will seek to assume the Section 404 program, with Florida being the first state to formally apply for program assumption in decades.

- Florida is the first state to receive approval to administer a CWA 404 program in over 25 years.
- Process:
 - On August 5, 2020, EPA Region 4 Administrator Mary S. Walker and Noah Valenstein, Secretary of the Florida DEP, signed a Memorandum of Agreement (MOA) as part of the assumption process.
 - On August 20, 2020, Governor Ron DeSantis submitted a request for EPA to conduct a review and approve Florida's program to assume administration of the CWA 404 program.
 - EPA solicited public review and comment on Florida's proposal to administer a Section 404 program as well as soliciting public comment and consulting under Section 106 of the National Historic Preservation Act (NHPA).
 - EPA also held virtual public hearings, during which EPA accepted comments regarding Florida's request and regarding potential effects on historic properties pursuant to Section 106 of NHPA.
- Endangered Species Act
 - Part of the review process included the development of a comprehensive Biological Evaluation that addressed more than 200 endangered species throughout Florida.
 - EPA used this Biological Evaluation to initiate and complete consultation under Section 7 of the Endangered Species Act with the U.S. Fish and Wildlife Service, which is the first and only time the Agency has ever completed such consultation under Section 404(g) of the CWA.
 - That consultation culminated in the issuance of a Biological Opinion and Incidental Take Statement covering EPA's decision to approve Florida's program, Florida's implementation of the program, and most importantly, providing liability protection to permit applicants through state-issued permits as long as those project applicants comply with the procedures established in the Bi-Op, ITS, and Florida's program.
- National Historic Preservation Act
 - EPA also consulted with the Advisory Council on Historic Preservation under Section 106 of the National Historic Preservation Act. That consultation resulted in the execution of a Programmatic Agreement with multiple parties that address how historic property and cultural and tribal resource concerns will be addressed in the Administration of Florida's Section 404 permit program. This, like the ESA consultation, is the first such consultation completed under Section 404(g) of the CWA.
- Florida's submission, which EPA determined to be complete, included the MOA and other required elements which EPA considered in determining that Florida's program met the standards established under Section 404 of the CWA and implementing regulations.
- Florida has one of the most robust wetlands protection programs in the country.

About Section 404

- Section 404 of the CWA requires a permit before dredged or fill material may be discharged into waters of the United States. Section 404(g) of the CWA gives states and tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters.
- Section 404 permits for those assumed waters would be issued by the state or tribe instead of the U.S. Army Corps of Engineers. The CWA provides that the Corps retains permitting authority in certain tidal waters and other specified waters currently related to the transport of interstate or foreign commerce (essentially, Rivers and Harbors Act Section 10 waters).
- A state program must be as least as stringent as the Corps' permitting program in order to receive transfer approval from EPA.
- Importantly, the decision to approve a state Section 404 program is not about which waters are protected. It is about which entity is responsible for implementing the Section 404 permitting program in assumed waters.